



Confederated Tribes and Bands
of the Yakama Nation

Established by the
Treaty of June 9, 1855

June 5, 2009

Authorized Officials
Portland Harbor Natural Resource Trustee Council
c/o Stephen Zylstra
US Fish and Wildlife Service
2600 SE 98th Avenue, Suite 100
Portland, OR 97266

Re: Portland Harbor Natural Resource Trustee Council - Yakama Nation's Withdrawal

Dear Authorized Official,

As we discussed on May 21, 2009, the Yakama Nation will be withdrawing from the Portland Harbor Natural Resource Trustee Council (Trustee Council), effective 10 days from the date of this letter.¹

The Yakama Nation is disappointed we could not find a way to resolve our current differences. As we discussed, the areas of disagreement centered around whether, how and when to address potential harm to juvenile salmon, other fish and natural resources in the Columbia River.

The Yakama Nation has a long history of taking assertive action regarding the Columbia River. One of the reasons for the Yakama Nation's involvement in Portland Harbor Superfund matters has been concern with the harm potentially done to the Columbia River and its resources by Portland Harbor pollution. All pollution released into the Willamette River has flowed into and thru the Columbia River, except for that which is still in the Willamette River or Multnomah Channel, or has been removed by dredging. Of particular concern has been the potential harm done by this pollution to juvenile salmon as they pass through the last 100 miles of the Columbia River estuary from the confluence with the Willamette River to the Pacific Ocean.

¹¶ X.1. of the NATURAL RESOURCE TRUSTEE MEMORANDUM OF AGREEMENT FOR THE PORTLAND HARBOR SUPERFUND SITE (MOU) provides that withdrawal is effective 10 days after written notice such as this letter.

In the Yakama Nation's view, any phased settlement approach such as that being undertaken at Portland Harbor must address *all* potential harm to natural resources in the Columbia River. As we discussed, there would seem to be two ways of doing this. One way would be to first assess *all* the injury caused by Portland Harbor pollution, including that to the Columbia River water and juvenile salmon there, and then settle with cooperating polluters (Potentially Responsible Parties or "PRPs") for the damage done by the pollution they released. The second way would be to address the matter at the outset with the cooperating PRPs and agree to first work toward a *partial* settlement involving only injury and damage in the Willamette River, but agreeing to jointly address problems in the Columbia later.

We were surprised and disappointed that the other Trustees did not share this view. We were particularly disappointed in the positions of the federal agencies (NOAA, DOI-FWS) which have a trust obligation owed the Yakama Nation to protect our Treaty trust resources such as the salmon and other fish. This refusal of other Trustees to presently address matters in the Columbia River seemed most unusual in light of:

- Recent Columbia River NOAA Salmon Work - Recent salmon studies by NOAA Fisheries indicate that juvenile salmon in the Columbia River downstream of the confluence with the Willamette River are exposed to contaminants of the type released at Portland Harbor at higher levels than those upstream of the confluence, and that such exposure is of sufficient magnitude to place them at risk of injury.
- Judge Redden Letter – On Monday of the same week we met, the federal Judge in the BiOp case, *NWF v. NMFS*, raised concerns regarding mitigation work to ensure salmon survival in the Columbia River estuary (from Bonneville Dam to the Pacific Ocean). Despite Judge Redden's letter, NOAA turned a blind eye to the Columbia River when we met three days later, choosing a course of *not* assessing injury in the Columbia River that may have been caused by Portland Harbor pollution, and could ultimately result in additional restoration or mitigation work in the lower 2/3 of the estuary paid for by Portland Harbor polluters.²
- Recent Supreme Court Decision – The refusal to take prudent steps necessary to ensure that later claims for damage in the Columbia River would not be barred by the recent U.S. Supreme Court CERCLA decision of *Burlington Northern v. U.S.*, 129 S.Ct 1870, 1882, fn. 9 (2008) (holding that equity considerations *cannot* be considered in allocating PRP liability).

When it became clear that 1) the others on the Trustee Council saw things differently than the Yakama Nation, 2) were firm in their desire to exclude the Columbia River in Phase 2 settlement process

² The *NWF v. NMFS* BiOp litigation (future mitigation regarding Endangered Species Act [ESA] listing of salmon) addresses a situation very different than this Portland Harbor Superfund natural resource damage assessment (a Superfund action to restore or compensate for past and future injuries to natural resources). Both, however, address harm done to salmon in the Columbia River watershed. While the Yakama Nation has not challenged the BiOp in *NWF v. NMFS* and generally supports the United States (NOAA's) position in that litigation, the Yakama Nation also supports anything that can be done in the estuary to aid the salmon, including additional mitigation and restoration work, especially in light of Judge Redden's letter.

with the cooperating PRPs, 3) would not commit to *ever* doing the assessment work in the Columbia River necessary to determine the extent of possible injury and damage there, and 4) were not interested in initially securing a partial settlement understanding with the cooperating PRPs that would protect later claims regarding the Columbia River, the Yakama Nation felt it best to withdraw from the Trustee Council and pursue its Portland Harbor natural resource damage remedies on its own in a way which addresses the Columbia River.

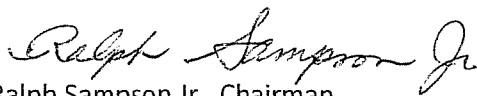
The Yakama Nation intends to continue being actively involved in Portland Harbor matters. We will still be involved in all aspects of EPA's Response activities working with the Lower Willamette Group. We will continue to be involved in the early actions at GASCO, Arkema and the Port of Portland's Terminal 4. We will also be continuing our work on natural resource damage matters, including work with cooperating PRPs in an effort to resolve *all* of their natural resource damage liability, including that in the Columbia River, in a timely and appropriate manner.

As we wind down our participation on the Trustee Council over the next 10 days until this withdrawal is effective, I have directed the Yakama Nation's staff and contractors to cooperate with your staff and contractors to make sure that you have access to all Portland Harbor documents, data, reports or studies in our possession that you feel would help your effort. I would appreciate it if you would do the same.

We also must address fiscal matters. I have directed the Yakama Nation's staff to prepare an accounting of all funding relating to the Yakama Nation's work on the Trustee Council. The Trustee Council MOA calls for the Lead Administrative Trustee, which the MOA designates as NOAA, to prepare an accounting when a Trustee leaves the Council.³ I would ask that this be promptly done. A separate accounting by DOI-FWS should also be conducted to fully account for all funds received from Cooperating Responsible Parties and held by DOI for all Trustees, including the Yakama Nation.⁴

The Yakama Nation wishes you well as you pursue the work you are doing, and looks forward to working cooperatively with you when appropriate.

Sincerely,



Ralph Sampson Jr., Chairman
Yakama Nation Tribal Council

³ Under ¶ X.1. and ¶ VI. of the MOU, an accounting of all Trustee Council funds is required by NOAA as the Lead Administrative Trustee (LAN) [see MOA ¶ 3 designating NOAA as LAN].

⁴ In light of information received that within the last month DOI made a partial distribution of these funds to Trustees *other than* the Yakama Nation, such accounting must account for ALL such Portland Harbor funds ever received and/or disbursed by DOI.

cc: Samuel N. Penney, Executive Committee Chairman, Nez Perce Tribe
Antone Minthorn, Board of Trustees Chairman, Confederated Tribes of the Umatilla Indian Reservation
Ron Suppah, Tribal Council Chairman, Confederated Tribes of the Warm Springs Reservation of Oregon
Delores Pigsley, Tribal Council Chair, Confederated Tribes of Siletz Indians
Cheryle A. Kennedy, Tribal Council Chairwoman, Confederated Tribes of the Grand Ronde Community of Oregon
Craig O'Conner, Regional Counsel, NOAA Office of the Northwest Regional Counsel
Robyn Thorson, Regional Director, U.S. Fish & Wildlife Service - Pacific Region
Roy Elicker, Director, Oregon Department of Fish and Wildlife
Michelle Pirzadeh, Acting Regional Administrator, U.S. EPA Region 10
Dan Oplaski, Director, U.S. EPA Region 10 Environmental Cleanup Office